RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

ENDREW F., A MINOR BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

AMICI CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION, CALIFORNIA SCHOOL BOARDS ASSOCIATION AND ITS EDUCATION LEGAL ALLIANCE, COLORADO ASSOCIATION OF SCHOOL BOARDS, AND HORACE MANN LEAGUE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

What is the level of educational benefit that school districts must confer on children with disabilities to provide a free appropriate public education guaranteed by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*?

INTERESTS OF THE AMICI

Amici Curiae, National School Boards Association (NSBA), California School Boards Association (CSBA) and its Legal Alliance Fund (LAF), Colorado Association of School Boards (CASB), and the Horace Mann League (HML) respectfully submit this brief in support of the Respondent.[1] **NSBA** is a national organization representing state school boards associations and their more than 90,000 local school board members. NSBA believes education is a civil right and that public education is America's most vital institution. NSBA advocates for equity and excellence in public education through school board leadership. **CSBA** is a non-profit, member-supported organization that advocates for and advances the interests of more than 6 million public school students

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[1] All parties have consented to the filing of this brief under Rule 37.3(a). Letters showing such consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to the preparation and submission of this brief.

in the state of California. Nearly all of California's 1,000 school districts and county offices of education are members. The CSBA's **ELA**, composed of approximately 725 CSBA member districts, addresses public education legal issues of statewide concern and seeks to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law and to make appropriate policy decisions for their local agencies. **CASB** represents more than 1000 school board members and superintendents from across the state. Established in 1940, CASB provides the structure through which school board members unite in efforts to promote the interests and welfare of Colorado school districts. **HML** is an organization dedicated to perpetuating the ideals of Horace Mann, the founder of American public school systems, to strengthen the public school system of the United States. It believes that federal grants should be contingent on federal control or interference in the administration, curriculum, personnel, or instructional procedures of local schools.

Amici have a profound interest in this case, because the Court's decision will impact the ability of schools across the nation to address effectively the needs of special education students. *Amici* and their members believe that all children should have equal access to an education that maximizes each student's individual potential. To accomplish this goal, *Amici* seek to offer arguments and information that will help this Court reach a decision that preserves the *Rowley* standard as the means to determine whether public schools have met their obligation to provide a free appropriate public education (FAPE) to children under the IDEA. The *Rowley* standard properly

recognizes and respects Congress' intent to defer to state and local education agencies the task of improving educational outcomes for children. For the reasons explained below, we urge this Court to affirm the decision of the Tenth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

All parties, including *Amici,* care very deeply about children with disabilities and want to ensure that they are provided special education and related services designed to meet their unique needs and to prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d)(1)(A). The parties also must be committed to the IDEA's requirement that children with disabilities are educated in programs that meet state standards and, to the maximum extent appropriate, are educated with children who are not disabled. *Id.* § 1412(a)(5)(A).

Balancing those principles is both art and science. It requires extensive collaboration between a multitude of professionals and active participation of parents to meet each particular child's unique needs. Recognizing this dynamic, Congress deferred to the individualized educational program ("IEP") team to engage in what one court described as the "alchemy of reasonable calculation." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992-93 (1st Cir. 1990). It expressly placed responsibility on the IEP team to determine the desired outcome for each child. Because Congress recognized the importance of tailoring the IEP to the particular needs of each child, it chose not to define statutorily the substantive level

of educational benefit necessary to meet the IDEA's FAPE requirement. From the IDEA's enactment in 1975, and in every reauthorization since then, Congress has not changed this fundamental understanding. Nor should this Court, for to do so would undermine the longstanding, effective IEP process, risking the very individualized education Congress sought to provide for special needs students.

ARGUMENT

I. CONGRESS INTENDED TO DEFER TO STATES AND LOCAL EDUCATIONAL AGENCIES THE ESSENTIAL TASKS OF IMPROVING EDUCATIONAL OUTCOMES FOR STUDENTS.

As this Court acknowledged in *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205-06 (1982), Congress intended from the outset of the IDEA that the essential tasks of improving educational outcomes for students be determined by state and local agencies in collaboration with parents. This intentional deference to local decision making recognized that a collaborative, individualized process is the best way to determine and provide the necessary services to achieve the educational benefit required by FAPE. For this reason, Congress omitted from the IDEA and its predecessor(s) a general substantive standard for the provision of FAPE. *See Id.* at 191-92, 205-06.

In 1975, Congress enacted IDEA's predecessor, the Education for All Handicapped Children Act (EHA), to ensure that students with disabilities

receive access to public schools and FAPE. Pub. L. No. 94-142, 89 Stat. 773. The EHA defined FAPE as:

> Special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet[s] the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 614(a)(5). *Id.* at Stat. 775.

In 1982, this Court, looking to the "elaborate and highly specific procedural safeguards" of the EHA, found it "no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures" as on substantive standards. *Rowley*, 458 U.S. at 205-06. The Court held that the focus on procedural rights and compliance "demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much, if not all, of what Congress wished in the way of substantive content in an IEP." *Id.* However, because "[i]mplicit in the congressional purpose of providing access to a [FAPE] is the requirement that the education to which access is provided be sufficient to confer *some educational benefit* upon the handicapped child," *id.* at 200-01 (emphasis added), the Court found that "[t]his basic

floor of opportunity is *the only substantive standard imposed by the Act*." *Id.* at 191-92 (emphasis added).

The Court recognized that "[t]he primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child." *Id.* at 207. IDEA delegates to IEP teams the authority to develop a student's IEP, make decisions regarding a student's educational program and collectively consider concerns parents have for "enhancing the education of their child." *See* 20 U.S.C. §§ 1412(a)(4), 1414(d)(3)(A)(ii). This framework is elaborate in order to establish the structure most likely to result in beneficial outcomes for disabled children. 458 U.S. at 205-06.

A. By Design the IDEA's IEP Requirements Ensure that Each Child Receives the Educational Benefits Envisioned by Congress Consistent with *Rowley*.

1. The comprehensive and collaborative IEP process is uniquely applied to each disabled child.

For decades IEP teams have collaborated in good faith with parents to design and deliver excellent, successful special education

programs.[2] The procedural requirements ensure this by creating a framework that fosters the development of an IEP that provides educational benefit for each child with a disability. An IEP team's offer of special education and related services flows from a detailed, pedagogical process that begins with a formal, multi-faceted identification of each child's unique needs and does not depend on some amorphous barometer of educational benefit.

The level of educational benefit enjoyed by each child is a product of the IEP process itself and the IEP team's individualized determinations. The IEP process requires the team to connect the dots between detailed procedural components and to tie individualized goals based on specific needs to services reasonably calculated to allow the particular child to meet those goals, to participate to the extent practicable in the general education curriculum, and to participate with non-disabled peers.

Although each procedural requirement in the IEP process is the same for every child, each step is carried out in practice in a complex and targeted manner unique to the needs of each child. With the parents' informed consent, the district conducts a formal evaluation of the child in all areas of suspected disability, 20 U.S.C. §§ 1414(a)(1)(C)(i)(I), 1414(a)(1)(D)(i)(I), using "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information by the parent, that may assist in

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[2] *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62-63 (2005) (Stevens, J., concurring) ("[W]e should presume that public school officials are properly performing their difficult responsibilities under this important statute.").

determining whether the child is a child with a disability; and the content of the [IEP], including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities."[3] *Id.* § 1414(b)(2)(A).

Upon completion of the evaluation, an IEP team meets to review the results, *id.* § 1414(a)(1)(C)(i)(I), along with current classroom-based, local, or state assessments and classroom-based observations, and other observations by the child's teachers and related service providers. *Id.* § 1414(c)(1)(A). The IEP team is uniquely composed for each child and must include the parents, at least one general education teacher, at least one special education teacher, a school district representative, individuals who can interpret the instructional implications of evaluation results, others with knowledge or special expertise regarding the child, and, when appropriate, the child.[4] *Id.* § 1414(d)(1)(B). Beyond these minimum requirements, the composition of the team may vary to include additional experts and resources according to the child's disability and needed services.

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[3] IDEA's procedural safeguards allow parents to obtain an independent educational evaluation at public expense if they disagree with the district's evaluation. 20 U.S.C. §§ 1415(b)(1), 1415(d)(2)(A); 34 C.F.R. § 300.502.

[4] The state educational agency must establish and maintain qualifications to ensure that personnel necessary to carry out IDEA's purposes are appropriately and adequately prepared and trained to serve children with disabilities. 20 U.S.C. § 1412(a)(14)(A).

2. IEPs must set forth a comprehensive educational program tailored to each child's individualized needs.

Based on all the information gathered, the team develops an extensive educational program that must include numerous components specified by the statute to ensure that the child is receiving the services necessary to provide educational benefit on a continuous basis. The IEP must identify the child's present levels of academic achievement and functional performance and must document "how the child's disability affects the child's involvement and progress in the general education curriculum." *Id.* § 1414(d)(1)(A)(i)(I)(aa). The IEP must also enumerate specific annual academic and functional goals designed to meet the child's needs arising from the disability to enable the child to be involved and make progress in the general education curriculum; and meet the child's other needs that result from the disability. *Id.* § 1414(d)(1)(A)(i)(II). For children who take assessments aligned to alternate achievement standards, the IEP must include a description of benchmarks or short-term objectives for each goal.[5] *Id.* § 1414(d)(1)(A)(i)(I)(cc).

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[5] "Benchmarks and short-term objectives allow for regular checks of the child's progress toward achieving the annual goals. The purpose of benchmarks and short-term objectives is to enable a child's teachers, parents, and others involved in developing and implementing the child's IEP to gauge, at intermediate times during the year, how well the child is progressing toward the achievement of the annual goal". Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and

The IEP must also recommend special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, and must include a statement of the program modifications or supports for school personnel designed to allow the child to advance appropriately toward attaining the child's individualized annual goals; to be involved in the general education curriculum; and to be educated and participate with other children both with and without disabilities to the maximum extent appropriate. *Id* § 1414(d)(1)(A)(i)(IV). The IEP may specify special classes, separate schooling, or other removal of the child from the regular educational environment only when the nature or severity of the disability of a child is such that education in regular classes even with the use of supplementary aids and services cannot be achieved satisfactorily. *Id.* § 1412(a)(5)(A).

3. Implementation of the IEP includes progress reporting, ongoing review and periodic re-evaluation.

Following completion of the IEP, the school district must ensure that the specified education and services are delivered in accordance with the plan and must provide parents with "periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance

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Toddlers with Disabilities, 64 Fed. Reg. 12,406, 12,471-72 (Mar. 12, 1999).

of report cards)." *Id.* § 1414(d)(1)(A)(i)(III). The IEP team must reconvene on at least an annual basis to review and update the IEP. *Id.* § 1414(d)(4). The team may reconvene at any time to amend the IEP, including at the request of the parents or other IEP team member, or because of the lack of expected progress. *Id.* §§ 1414(d)(3)(F), 1414(d)(4)(A)(ii)(I). The school district must reevaluate the child at least once every three years, unless the parent and the school district agree that a reevaluation is not necessary. *Id.* § 1414(a)(2)(B)(II).

4. Development of an IEP is a complex and fact specific endeavor not amenable to the application of an artificial national standard.

The IEP process "alchemy" requires a multidisciplinary team working with the parents to gather information from a variety of sources, determine the needs that team values most for a particular child, and account for a myriad of factors to offer an educational program that balances academic benefit, social and emotional development, behavioral concerns, and other needs related to the disability – all while maximizing exposure to peers. The balance is complex and fact-specific, *Poolaw v. Bishop*, 67 F.3d 830, 836 (9th Cir. 1995). Because this balance requires weighing fine points for each child, this task is best left in the hands of the IEP team, *Roland M.*, 910 F.2d at 992-93, unencumbered by an arbitrary and amorphous national standard lacking any sound educational basis for improving educational outcomes for children with disabilities.

To illustrate the degree of complexity and specificity entailed in developing an IEP to serve each child, consider the following scenarios involving two children in the third grade. One is high-functioning and qualifies for special education and related services under the category of specific learning disability (SLD). The other is severely-impacted and qualifies under the category of intellectual disability (ID).

Initially, when the students are in first grade, the school district assesses each student in all areas of suspected disability. A school psychologist assesses the students' cognitive development, auditory and visual processing, attention, executive functioning, social/emotional functioning, and adaptive behavior. A speech/language pathologist assesses the students' receptive, expressive, and pragmatic language, and articulation. A special education teacher assesses the students' academic achievement. An occupational therapist assesses the students' fine and visual motor skills, and sensory perception. All evaluators employ standardized assessment instruments, questionnaires and checklists, and conducted observations.

The initial assessments reveal that both students demonstrate unique needs in the areas of reading fluency and written expression, among other areas. Based on those needs, the IEP team develops for each student an IEP that included individualized goals, growth measurements for each goal and an outline of the placement, special education and related services to support each child's progress on those goals.

Then at the beginning of third grade, each student's IEP team reconvenes to review progress from the previous year and update the IEP for the following year. Each team consists of the parents, the school psychologist, the child's special education teacher, the speech/language pathologist, and the occupational therapist. The teams also include the child's general education teacher and a principal. Each team reviews the student's academic achievement, functional performance throughout the school year, progress in their respective special education programs, and functioning when "mainstreamed" in the general education environment. Following that discussion, each team determines that the student continues to have needs in reading fluency and written expression, among other needs.

The state in which the students reside has adopted the following standards for third graders in those academic areas:

> 1. Reading fluency: Students must read with sufficient accuracy and fluency to support comprehension by reading grade-level prose and poetry orally with accuracy, appropriate rate, and expression on successive readings.
>
> 2. Written expression: Students must write opinion pieces on topics or texts, supporting a point of view with reasons by introducing the topic or text they are writing about, stating an opinion, and creating an organizational structure that lists reasons.

To keep the students' IEPs aligned with those standards, each team drafts annual goals in reading fluency and written expression. For the SLD student, the IEP team drafts the following goals based on comparable standards from the previous grades:

> 1. Reading fluency: By September 1, 2017, [student] will read with sufficient accuracy and fluency to support comprehension by reading a beginning second grade-level text orally with 90 percent accuracy at a rate of 100 words per minute, in two out of three successive readings as measured by teacher charting.
>
> 2. Written expression: By September 1, 2017, [student], when given a graphic organizer, an edit checklist, and modified paper, will write an opinion piece that includes a topic sentence, three supportive facts, and a concluding sentence, with 75 percent accuracy in two out of three trials as measured by work samples.

For the ID student, his IEP team drafts the following goals based on a functional modification of the standards:

> 1. Reading fluency: By September 1, 2017, when given a functional scenario by staff, [student] will identify the appropriate task by selecting a picture,

from a field of three, in five scenarios per minute, in two out of three successive readings as measured by teacher charting.

2. Written expression: By September 1, 2017, [student], when given structured writing materials and a model of his name, will independently copy the letters of his name with 80 percent accuracy in two out of three trials as measured by work samples.

Following the development of goals, each team discusses the least restrictive environment in which to implement those goals. The SLD student's team notes the student's success the previous year when pulled out of class for 45 minutes per day to work with a special education teacher individually on his reading and writing goals. The general education teacher, though, is concerned about the student missing valuable class time and requests that the services be provided within the general education classroom. Consequently, for third grade, the district offers to provide the same amount of special education, albeit incorporated into the general education environment with small group instruction so that the student is not unnecessarily stigmatized within the classroom.

The ID student's team notes the progress that the student made on his functional academic goals in a self-contained classroom with an 8:2 student/adult ratio. However, the parents are not as concerned with their child's academic functioning as much as they are with his exposure to non-disabled peers; they would

like his educational program to focus on his other goals in the areas of social interaction, pragmatic language and behavior. They feel the student would be best served in a general education classroom with a 1:1 aide for the school day. The district determines that although the student might have less opportunity to work on his functional reading and writing goals, he will have more opportunity to interact with non-disabled peers, which may provide greater benefit to his social/emotional development.

This process belies the argument that the *Rowley* standard in concert with the IEP development and implementation lead to trivial substantive benefits. In fact, neither IEP team aims to design a program calculated to provide slightly more than *de minimis* benefit. Instead each team collaborates to determine each child's needs, connect those to measurable goals, weigh the appropriate level of restrictiveness of the child's placement, and sometimes choose progress on certain goals over others—all for the purpose of supporting the child's progress toward the individualized goals adapted from the state education standards.

5. The IEP process under the *Rowley* standard has yielded significant improvement in the education of children with disabilities.

Children with disabilities have experienced considerable academic growth and social participation in the years since Congress first enacted the IDEA. These improvements could not have been achieved if, in fact, children with disabilities have

been receiving only the barest of services to satisfy a "more than *de minimis*" legal standard. More than ever before, they are graduating high school, learning in general education classes, improving academically and enrolling in postsecondary programs. The percentage of students with disabilities graduating high school with a regular high school diploma has increased from 41% in 1993 to 65% in 2013.[6] The percentage of students with disabilities who spend most of the school day (80% or more of time) in general education classrooms has increased from 33% in 1990-91 to 61% in 2013-14.[7] Students with disabilities have, as a whole, improved in reading and math at a rate largely commensurate with general education students.[8] From 1990 to 2005, the number of students with disabilities enrolling in a postsecondary program within four years of finishing high school jumped from 26.3% to 45.6%.[9]

These statistics demonstrate that IEP teams are not basing their recommendations on the goal of meeting a "more than *de minimis*" legal standard. Rather, educators and families, working together, are

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[6] NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 2016 (NCES 2016-144), *available at* http://nces.ed.gov/pubsearch.

[7] *See id.*

[8] NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE NATION'S REPORT CARD: 2015 MATHEMATICS & READING, *available at* http://www.nationsreportcard.gov.

[9] Am. Insts. for Research, Coll. & Career Readiness & Success Ctr., Improving College and Career Readiness for Students with Disabilities 2-3 (Mar. 2013), *available at* http://www.ccrscenter.org/sites/default/files/improving%20college%20and%20career%20readiness%20for%20students%20with%20disabilities.pdf.

creating programs that produce positive outcomes and achieve Congress' vision:

> to assure that all handicapped children have available to them...a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist states and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

Pub. L. No. 94-142, 89 Stat. 775, § 601(c) (1975). As the U.S. Department of Education concluded in 2001, the "IDEA has exceeded President Ford's greatest hopes. Children with disabilities are now being served in public schools alongside their nondisabled brothers, sisters, and friends. And, new opportunities abound." [10]

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[10] U.S. Dep't of Educ. Office of Special Education and Rehabilitative Services, *A New Era: Revitalizing Special Education for Children and Their Families*, at *9 (July 1, 2002), http://ccta center.org/~pdfs/calls/2010/earlypartc/revitalizing_special_education.pdf.

B. A New National "Standard" Would Deprive Students of the Benefits of Individualized Consideration by Shifting the IEP Team's Focus Away from the Fine Points of a Child's Disability to Artificial Legal Constructs.

1. A heightened FAPE standard will interfere with the collaborative IEP process by injecting an unmanageable degree of uncertainty.

The *Rowley* Court's "some" educational benefit standard recognizes and respects Congress's intent to defer to state and local agencies' educational judgments about the services students with disabilities need. At the same time, it provides a safeguard against the continued implementation of programs that are clearly not resulting in educational benefit. In contrast, the new FAPE standards advocated by Petitioner and supporting *amici* would substantially disrupt the collaborative work of IEP teams by shifting their focus from designing appropriate programs to complying with ambiguous legal constraints. For the seven million students currently receiving special education and related services,[11] an IEP team unique to each child engages in thoughtful analysis of each child's individualized

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[11] *See* U.S. Dep't of Educ., 38th Annual Report to Congress on Implementation of the Individuals with Disabilities Education Act, 2016 at xxi-xxiv, *available at* http://www2.ed.gov/about/reports/annual/osep/2016/parts-b-c/index.html (retrieved Dec. 17, 2016).

needs, at least once a year. For each team to try to quantify the level of benefit pertaining to those needs necessary to adhere to a new artificial national standard with no clear statutory or regulatory basis or guidance would be beyond impractical. Importantly, at no point since the original enactment of the Act has the U.S. Department of Education issued any implementing regulations or agency guidance requiring an alteration in the meaning of FAPE as explained by this Court's *Rowley* decision, even as the U.S. Government now joins the Petitioner and his *amici* in urging this Court to adopt one of seven different substantive standards. The lack of one definitive standard among these proposals portends the difficulties and confusion IEP teams and courts will likely experience were the Court to depart from *Rowley*.

Petitioner proposes a standard based on "substantially equal opportunity to achieve academic success, attain self-sufficiency and contribute to society," arguing that educators must "set the same kinds of high goals for children with disabilities as they set for their other students."[12] *See* Pet. Br. at 15, 41. Other than the setting of "high goals," the Petitioner offers no suggestions as to how to determine whether the IEP meets the proposed standard. How is a court, much less an IEP team, to determine the appropriate comparative group — is the opportunity offered substantially equal to that

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[12] *See Amici Curiae* Briefs of Advocates for Children of New York, National Disability Rights, and Former Officials of the U.S. Dep't of Educ. (joining Petitioner in arguing that the substantive standard should be "equal opportunity" or "substantially equal opportunity").

offered to non-disabled students in the same grade level? At the same school? Within the district? Within the state? What factors into determining opportunity — access to facilities, level of resources, quality of teachers, availability of special programs? How can an IEP team be certain the opportunity is "substantially" equal?

The National Education Association (NEA) proposes a standard based on "concrete, academic results." Achievement of some particular result is an approach specifically rejected by Petitioner. Pet. Br. at 49-50.

The United States proposes a standard based on "significant educational progress." Recognizing the lack of such definition in the IDEA, the United States turns to *Webster's Dictionary* to assert that the word "meaningful" as used in *Rowley* is synonymous with the word "significant" in its own definition. The United States omits the part of *Webster's* definition that defines "significant" as "a noticeably or measurably large amount." Under either definition, the United States' proposal is rife with ambiguity.

Delaware, Massachusetts, and New Mexico join the 118 Members of Congress to propose a standard based on "meaningful educational benefit," which also appears to be based on a particular result. The only guidance these *amici* propose for analyzing the requisite result is that their proposed standard is not the one that prevails now.

Parent Attorneys and Advocates (PAA) propose an equally vague standard based on compliance "with IDEA's substantive obligations in order to target all areas of a student's educational needs to ensure achievement in the general education curriculum."

PAA does not identify what would serve as a sufficient target, but, like the state and congressional *amici*, appear to advocate for a standard that exceeds the current standard.

Texans with Disabilities propose an altogether different standard that would require, in pertinent part, a determination of whether sufficient modifications, accommodations, and technologies allowed a student to progress in the regular curriculum, at grade level, in spite of the deficits due to disability, while the deficits are being remediated through specialized instruction.[13] That standard appears to be based on a child's ability to perform without a deficit.

Finally, the National Center for Special Education in Charter Schools (NCSECS) proposes a standard that is simply "higher" than "just-more-than-trivial-benefit," without defining or describing the parameters of this "higher" standard.

What the standards proposed by Petitioner and supporting *amici* share is a belief that an educational benefit standard is definable by what it currently is not. Defining a standard in the negative is no standard at all. At best such a standard is vulnerable to multiple interpretations, depriving students of a

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[13] Grade level performance is difficult to define. The use of grade level equivalents in standardized testing has been widely panned by the psychological community. Among other things, it ignores the dispersion that exists in reading level among typical students, which can provide a distorted view of a child's deficit or lack of deficit. For example, an average tenth grader may not perform at precisely a tenth grade reading level on a particular test. *See* Satter, J. M., *Assessment of children: Cognitive applications*, 4th Ed. (2001); Lyman, H. B., *Test Scores and What They Mean*, 6th Ed. (1998).

coherent pedagogical approach to addressing their educational needs. Absent from any of these analyses is a specific measure of the level of benefit which either IEP teams would be required to reasonably calculate or which a child would be required to achieve. Would progress within the limits of each child's disability be sufficient to meet a heightened standard? Would children with disabilities be required to progress at the same pace as their non-disabled peers? Would children with disabilities be required to exceed the rate of progress of non-disabled peers in order to "bridge the gap?" Would such progress be analyzed with deference to the IEP team's decision, albeit based on some higher expectation, or would it be analyzed in hindsight based on judicial review? Such questions would be difficult, if not impossible to answer as part of an ordinary IEP team discussion. The better tack already exists, as the *Rowley* Court recognized: courts should defer to the robust discussions in which IEP teams engage within the logical flow of their procedural commitments, and avoid second guessing the educational decisions that arise out of those discussions unless the procedures are not materially followed or it cannot be reasonably calculated that a child will benefit.[14]

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[14] Since *Rowley*, the application of the "some educational benefit" standard has not resulted in courts merely "rubber stamping" IEPs. *See Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003) (holding IEP not reasonably calculated to provide some educational benefit, in spite of student's progress, where it provided behavior goals without behavior management plan); *see also Bd. of Educ. of Kanawha v. Michael M.*, 95 F. Supp. 2d 600 (S.D. W. Va. 2000) (finding IEP inadequate in spite of goals and objectives that were "reasonably calculated to provide some educational benefit" because the methodology the district used

2. Departing from the current FAPE standard would create the inaccurate perception that IEPs valid under the *Rowley* standard shortchange students with disabilities.

For decades, IEP teams nationwide have been creating IEPs reasonably calculated to provide millions of students with disabilities with educational benefit in the least restrictive environment, while addressing their unique needs with appropriate goals and services, accommodations and modifications. If this Court expands the current FAPE standard, its decision will create a perception among IEP teams, including parents, that the programs *currently* offered to those students are insufficient, subjecting each IEP to the misconstrued requirement of upward revision regardless of its current effectiveness. Such a perception would lead to more confusion between parents and schools as to whether a child is actually receiving FAPE as everyone struggles to apply amorphous standards to real situations. Such uncertainty could create an adverse atmosphere where none existed before and likely would spur a significant increase in the number of due process complaints, pulling already-stretched public

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was not reasonably tailored to accomplish the goals); *Carter v. Florence Cnty. Sch. Dist. Four*, 950 F.2d 156, 159 (4th Cir. 1991), *aff'd* 510 U.S. 7 (1993) (finding IEP goals prescribing "mere four month's progress" and only three periods of individualized instruction per week "ensured the program's inadequacy from the inception.").

resources into litigation and away from the service of children.[15]

If this Court adopts a heightened FAPE standard, it removes the question from the demonstrably capable hands of the IEP team and places it into the realm of courts and administrative hearing officers. It would result in an environment in which the educational benefit sought through the redefined FAPE standard would inure only to parents who have the means and ability to access due process and courts, at the expense of other students with disabilities whose parents do not or cannot litigate. This is contrary to the purpose of the IDEA, which provides great deference and flexibility to IEP teams of *all* children to craft IEPs based on the team's educational expertise and personal knowledge of the individual student's unique needs.

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[15] In 1975, Congress promised to provide federal funds to cover 40% of the cost of educating students with disabilities by 1982. Pub. L. No. 94-142, 89 Stat. 777, § 1401(a)(B)(v) (1975). Federal funding only covered 16.2% of IDEA costs during the 2014 fiscal year. Clare McCann, *IDEA Funding*, EdCentral, http://www.edcentral.org/edcyclopedia/individuals-with-disabilities-education-act-funding-distribution/ (retrieved Dec. 12, 2016).

3. An expansion of the legal standard applied to educational benefit would negatively impact the willingness of IEP teams to place children with disabilities in the least restrictive environment.

"Educating children in the least restrictive environment in which they can receive an appropriate education is one of IDEA's most important substantive requirements." *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10th Cir. 2004); *accord Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995) (recognizing the least restrictive environment mandate as one of the "dual requirements" of IDEA); *Roland M.*, 910 F.2d at 992-93 ("Mainstreaming may not be ignored, even to fulfill substantive educational criteria"); *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 296 (7th Cir. 1988) (providing students with FAPE "must be weighed in tandem" with educating them in the least restrictive environment).

As the hypothetical IEP scenarios above illustrate, IEP teams must weigh their obligations to provide programs designed to allow children with disabilities the opportunity to progress on their goals, participate in the general education curriculum, and interact with their non-disabled peers. In the case of the SLD student, the team had to weigh the proven success of a 1:1 pull-out program with the detrimental effect of the student missing valuable class time –

class time that becomes increasingly crucial in higher grades as the curriculum focuses on substantive material rather than basic skills. In the case of the ID student, the team had to weigh the benefit of direct instruction at the student's functional academic level with what that team believed to be the heightened social and emotional benefit of the general education classroom. In both of these scenarios, an expansion of the legal standard applied to educational benefit could chill a team's willingness to prioritize general education class time, or social/emotional development over academic goals.

Courts have grappled with similar situations. In *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314-15 (9th Cir. 1987), a school district offered a placement that included both general and special education classes. The parents requested a placement that included three hours per day of individual tutoring outside the classroom setting. The IEP team had to balance the student's need to develop higher order intellectual skills with the tutoring program's emphasis on rote skills. *Id.* at 1315. The Ninth Circuit held that the district's offer was appropriately "designed to match the strengths and weaknesses that emerged" from the evaluation data. *See also Fuhrmann ex rel. Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1038 (3d Cir. 1993) (upholding district's placement in public preschool program rather than in private behaviorally-based program for students with autism to address child's major issues of social communication and language function); *Amann v. Stow Sch. System*, 982 F.2d 644, 651 (1st Cir. 1992) (while student's gains in private program might have

been greater, IEP team offered a program that "struck a suitable balance between the goals of mainstreaming and 'maximum potential development.'"); *Scott P.*, 62 F.3d at 535 (IEP in which district proposed placement of blind student in physical support class on comprehensive campus rather than residential school was appropriate, even if not "optimal.").

When an IEP team considers the information available, it may conclude that more than one placement available would provide the student with some educational benefit. Under the current framework, the IEP team balances the potential educational benefits of each program option against the least restrictive environment requirement. The IDEA is satisfied by such balancing, even if the team does not offer the placement that would confer the maximum educational benefit with respect to a particular need. *Amann*, 982 F.2d at 651 ("An IEP 'may not be the *only* appropriate choice, or the choice of certain selected experts, or the child's parents' *first* choice, or even the *best* choice,' yet still provide a free appropriate public education") (citation omitted) (emphasis in original)).

Moving to the heightened FAPE standard that Petitioner propounds would upset the balance between FAPE and least restrictive environment. IEP teams worried about meeting some results-oriented standard would be more likely to focus on relatively short-term annual gains, potentially subverting opportunities for children to develop the skills necessary to "prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A).

II. IMPOSING A NEW FAPE STANDARD WOULD VIOLATE THE SPENDING CLAUSE BY FAILING TO PROVIDE STATE AND LOCAL EDUCATION AGENCIES WITH APPROPRIATE NOTICE OF THE SCOPE OF THEIR OBLIGATIONS UNDER THE IDEA AND THEIR ACQUIESCENCE TO A NATIONAL EDUCATION STANDARD.

This Court should not do from the bench what it has said Congress cannot do by legislation—fail to give appropriate notice to the States about the obligations associated with accepting federal IDEA funding. *See Arlington Cent. Sch. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296-97 (2006); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981). A judicially imposed change in the FAPE standard would have just such an effect where Congress has made no change in the law and would violate the principles of federalism by invading educational policy decisions that belong to states and local governments.

A. Congress Has Provided No Clear Notice that the FAPE Standard Has Been Heightened Beyond the *Rowley* Standard.

The States, through the Spending Clause, accept federal funds in exchange for complying with IDEA, including its definition of FAPE. The statutory definition of FAPE, as interpreted by the Court in

Rowley, has not substantively changed since 1975.[16] This Court has continued to cite to *Rowley* when interpreting IDEA. *E.g., Arlington*, 548 U.S. at 296; *Schaffer*, 546 U.S. at 52-53. There is no reason for this Court to depart now from the *Rowley* standard, because Congress has not changed the statutory provisions at issue in any substantive way.

In *Arlington*, this Court applied *Pennhurst* to find that IDEA's fee-shifting provision did not authorize prevailing parents to recover fees for expert services in IDEA actions, because the relevant statutory provision must be interpreted from the perspective of a state official determining whether to accept the federal funds and the corresponding federal obligations. "In other words, we must ask whether the IDEA furnishes clear notice regarding the liability at issue in this case." *Arlington*, 548 U.S. at 296. This inquiry is even more critical here where the Court is being asked to re-interpret longstanding parameters on the fundamental obligation imposed by the IDEA.

Petitioner and supporting *amici* point to the 1997 and 2004 reauthorizations of IDEA as compelling a change in the *Rowley* standard. But in fact, Congress signaled no intent to change the *Rowley* Court's interpretation of the FAPE standard and declined to craft any such new and unambiguous condition.[17] Certainly, examining the 1997 and 2004 IDEA amendments from the perspective of a state

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[16] In 1997, Congress made a minor grammatical change to the definition of FAPE. *See* Pub. L. No. 105-17, 111 Stat. 37, 44.

[17] Neither has the United States formally in regulation or through informal guidance despite its posture in the instant case.

official, there is no notice of a new or more onerous obligation to provide a different level of FAPE. *See Arlington*, 548 U.S. at 296. Given the lack of any change in the FAPE definition by Congress, state officials and school districts have reasonably continued to rely on the *Rowley* standard.

1. Requiring that IEPs contain measurable annual goals and the participation of students with disabilities in statewide assessments does not evince congressional intent to heighten the FAPE standard.

Petitioner and NEA imply that the 1997 amendments introduced a *new* requirement that IEPs include annual goals, that evidenced Congress' intent to expand the FAPE standard. *See* Pet. Br. at 6-7; NEA Br. at 7. However, the initial enactment of the EHA in 1975 required that IEPs contain "a statement of annual goals, including short-term instructional objectives."[18] The 1997 amendments simply specified that goals should be "measurable."[19]

Petitioner attempts to shore up the case for clear notice of a heightened FAPE standard by pointing to the requirement in the 2004 IDEA reauthorization that students with disabilities participate in the statewide assessments and be included in the accountability standards mandated by the No Child

[18] Pub. L. No. 94-142, 89 Stat. 776 (1975).
[19] Pub. L. No. 105-17, 111 Stat. 37, 84 (1997).

Left Behind Act[20] (the predecessor of Every Student Succeeds Act (ESSA)). 20 U.S.C. § 1412(a)(15)-(16). The congressional findings in the preamble to IDEA 2004 do lament "low expectations" and express the view that educating students with disabilities is "more effective" when there are "high expectations" of them "to the maximum extent possible." *Id.* § 1400(c). Such general legislative findings are inadequate to impose a substantive obligation under the Spending Clause,[21] especially considering that the 2004 amendments contain no provisions aligning IEP requirements with NCLB testing requirements or requiring that IEP goals reflect grade level achievement. Instead, IDEA continues to describe a collaborative process designed to provide children with disabilities special education and related services individually tailored to meet their unique needs.

The primary ways Congress has chosen to encourage "high expectations" for students with disabilities are to require their inclusion in statewide assessments and the disaggregation of their group results on those assessments from those of the general education population. The IDEA, as amended in 2004, requires states (A) "to establish[..] goals for the performance of children with disabilities in the State that ... (iv) are consistent, to the extent appropriate, with any other goals and standards for children established by the State...; and to have performance indicators and annual reports." *Id.* §

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[20] 20 U.S.C. § 6311(b).

[21] *See Arlington*, 548 U.S. at 303 (rejecting an interpretation of attorneys' fees provision based on IDEA findings).

1412(a)(15). Students with disabilities are required to participate in the state assessments "with appropriate accommodations and alternate assessments where necessary and as indicated in their respective individualized education programs..." *Id.* § 1412(a)(16).

Taken together, the state accountability provisions (now expressed in ESSA) and the 2004 amendments to the IDEA do not stand for the proposition that any individual student from a subgroup has an individual entitlement to a particular level of progress. While Congress referenced the state's responsibility under another federal law to establish group outcome standards for students with disabilities (along with other subgroups), it did not change IDEA's *individual* entitlement to an appropriate program developed collaboratively according to the procedural protections of the statute. Congress specifically abjured from creating an entitlement to a certain level of academic progress in IDEA.

2. IDEA amendments adding transition services to IEP requirements fall far short of demonstrating clear notice of Congress' adoption of a heightened FAPE standard.

When Congress introduced transition services in the 1983 amendments, it authorized federal funding for states "to assist in the transitional process to postsecondary education, vocational training, competitive employment, continuing education, or

adult services," but did not require states to supply such services.[22] In 1986, Congress slightly modified the statute regarding transition services to "include[ ] supported employment" as an acceptable form of "competitive employment."[23] In 1990, Congress amended the definition of transition services and required IEPs to contain "a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger)... ."[24] In the 1997 reauthorization of IDEA, Congress required that "beginning at age 14, and updated annually, a statement of the transition service needs of the child ... that focuses on the child's course of study (such as participation in advanced-placement courses or a vocational education program)" must be included in a child's IEP.[25] Congress again made changes regarding transition services in the 2004 IDEA reauthorization, requiring that IEPs contain appropriate measurable postsecondary goals based upon age appropriate transition assessments and that transition services needed to assist the child in reaching those goals be provided beginning no later than the first IEP when the child is 16.[26] It also again amended the definition of transition services. As Congress has amended the transition services requirements over the years, it has never tied them to any clear change in the definition of FAPE, expressed

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[22] Pub. L. No. 98-199, 97 Stat. 1357, 1367 (1983).
[23] Pub. L. No. 99-457, 100 Stat. 1145, 1163 (1986).
[24] Pub. L. No. 101-476, 104 Stat. 1103-04 (1990).
[25] Pub. L. No. 105-17, 111 Stat. 37-44, 84 (1997).
[26] Pub. L. No. 108-446, 118 Stat. 2647 (codified at 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)).

disagreement with the *Rowley* standard, nor indicated that FAPE was contingent on a child's attainment of transition goals. *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 948-951 (9th Cir. 2009). "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009).

B. The IDEA's Deference to States and Local Education Agencies Is the Fundamental Construct Underlying the States' Agreement to Comply With Its Expansive Statutory and Regulatory Requirements in Exchange for Federal Funds.

The IDEA makes clear that both the broad education policy decisions necessary to implement the Act as well as judgments concerning the educational needs of individual students are appropriately left to the states and local agencies. This construct is of fundamental importance to the states' agreement to act in accordance with the IDEA in exchange for receiving federal funds. To carry out their responsibilities under the Act, states have adopted extensive procedures to comply with IDEA's statutory and regulatory requirements. In turn, local school personnel are responsible for following these procedures to develop IEPs, deliver the special education and related services specified in those IEPs and assess each student's progress toward meeting individualized goals. This Court properly discerned

Congress' wisdom in crafting this arrangement when it set forth the *Rowley* standard that focuses on state and local educators' compliance with IDEA's IEP process and procedural safeguards. In *Rowley*, the Court encourages courts reviewing IEPs to find them to satisfy FAPE requirements as long as they are reasonably calculated to provide some educational benefit in keeping with academic standards set by the state for children educated in the general curriculum. This standard is consistent with the Court's longstanding recognition that educational decisions should not be second-guessed by judges.[27]

Such judicial and congressional deference provides state and local policy makers with some assurance of stability in the law as they decide how best to provide FAPE to children with disabilities, including ensuring that adequate funding is available to pay for the necessary services. As the costs of special education have increased exponentially over the years, states and local school boards have continued to make concerted efforts to meet their commitment to serve children with disabilities. To do so, states have adopted different funding methods to pay for these rising costs, even as Congress has never met its commitment to fully fund 40% of the additional costs of educating student with disabilities.[28] These additional costs have a significant impact on state and local education budgets as students with disabilities, on average,

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[27] *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40-44 (1973) (noting that "[e]ducation, perhaps even more than welfare assistance, presents a myriad of 'intractable economic, social, and even philosophical problems.'" (citation omitted)).

[28] McCann, *IDEA Funding*, *supra* note 15.

require nearly two times more in total expenditures than their non-disabled peers.[29]

States generally use one of three main funding methods to provide special education and related services to students with disabilities: formula funding, categorical funding, or reimbursement.[30] Thirty-three states and the District of Columbia use formula funding to pay for the cost of educating students with disabilities.[31] Under this method, states allocate a lump sum to school districts based on a per pupil formula that provides a supplemental amount for students with disabilities. Formula funding generally provides individual school districts the flexibility to make policy determinations and use funds based on their needs. A heightened FAPE standard could reduce the district's flexibility as students with disabilities demand even more resources than accounted for in the supplemental allocation. This might require the district to draw funds away from services for other students.

Twelve states fund students with disabilities through categorical funds, sometimes called block or flat grant funding. States allocate such funding outside of the state's primary funding formula.[32] Districts can only use the categorical funds for students with disabilities.[33] While costs for special education are isolated in these states, a heightened

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[29] *Id.*

[30] *See* Maria Millard, Stephanie Aragon, *50-State Review: State Funding for Students with Disabilities*, Education Commission of the States, http://www.ecs.org/clearinghouse/01/19/47/11947.pdf (retrieved Dec. 16, 2016).

[31] *Id.*

[32] *Id.*

[33] *Id.*

FAPE standard would require states to bear the burden of the increased costs to meet the heightened standard.

Five states fund students with disabilities through reimbursements, also allocated outside of the state's primary funding formula.[34] School districts must report their actual expenses to the state and then are reimbursed for a portion of their costs to educate students with disabilities. State reimbursement rates vary from 26.79% in Wisconsin to 100% in Wyoming.[35] A heightened standard would place an increased burden on local school districts as there is no guarantee that states would have additional funds to reimburse districts for the associated costs.

The Court should not adopt a new and unexpected FAPE standard, as it could disrupt complex state funding schemes and require difficult adjustments that impact the resources available to educate other children—burdens which the state and local education agencies did not knowingly accept.

CONCLUSION

Congress empowered IEP teams with both the authority and responsibility to identify students' needs, prioritize them, and offer special education and related services calculated to allow students with disabilities to receive educational benefit in keeping with state standards and in the least restrictive environment appropriate to their needs. Deference to

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[34] *Id.*

[35] *Id.*

the IEP process is the only workable manner by which to achieve the goals of IDEA. *Amici* urge the Court to reaffirm the standard it set forth in *Rowley* rather than adopt an artificial national standard that would call millions of programs into question and require schools to re-examine and litigate more claims, contrary to the purposes of the IDEA.

Based on the foregoing, and the reasons set forth in Respondent Douglas County School District RE-1's brief, *Amici* respectfully request that this Court affirm the decision of the Tenth Circuit Court of Appeals.

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